United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

74-2548

To be argued by
MICHAEL S. DEVORKIN

United States Court of Appeals
FOR THE SECOND CIRCUIT
Docket No. 74-2548

JOHN R. PATTERSON, *et al.*,
Plaintiffs-Appellees,

—against—

NEWSPAPER AND MAIL DELIVERERS' UNION OF NEW YORK AND VICINITY, *et al.*,
Defendants-Appellees.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Plaintiff-Appellee,

—against—

NEWSPAPER AND MAIL DELIVERERS' UNION OF NEW YORK AND VICINITY, *et al.*,
Defendants-Appellees.

JAMES V. LARKIN,
Intervenor-Appellant.

DOMINICK VENTRE, *et al.*,
Intervenors.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF APPELLEE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 74-2558

JOHN R. PATTERSON, et al.,

Plaintiffs - Appellees,

-against-

NEWSPAPER AND MAIL DELIVERERS' UNION OF NEW YORK AND VICINITY, et al.,

Defendants - Appellees.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Plaintiff - Appellee,

-against-

NEWSPAPER AND MAIL DELIVERERS' UNION OF NEW YORK AND VICINITY, et al.,

Defendants - Appellees.

JAMES V. LARKIN,

Intervenor - Appellant.

DOMINICK VENTRE, et al.,

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BRIEF OF APPELLEE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

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Issue Presented

Did the District Court properly exercise its discretion in approving a Settlement Agreement proposed by the Government, the private plaintiffs, the Union and all employer defendants, which was designed to achieve equal employment opportunity and to remedy the effects of past discriminatory practices, notwithstanding the objections of white intervenors?

Statement of the Case

Intervenor-appellant, James V. Larkin, has appealed from the Final Order and Judgment (R. 145)*, dated October 25, 1974, entered upon consent of all plaintiffs and defendants, after trial in the United States District Court for the Southern District of New York (Hon. Lawrence W. Pierce presiding). The Final Order and Judgment challenged herein approved a Settlement Agreement dated June 27, 1974, (attached thereto as Exhibit A) between plaintiffs and defendants, which establishes back pay funds for minority individuals and new hiring practices and other affirmative relief designed to achieve a goal of 25% minority industry employment by June 1, 1979.

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* R. refers to the record on appeal, and numbers, unless otherwise indicated, refer to the document number in the index to the record.

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Statement of Facts

A. The Instant Suits

Private plaintiffs filed suit on July 11, 1973, (73 Civ. 3058) (R. 1) and the Government filed suit October 9, 1973, (73 Civ. 4278) (R. 149) under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§2000e et seq., (hereinafter the "Act") to enjoin a pattern and practice of discrimination against non-whites by the Newspaper and Mail Deliverers' Union of New York and Vicinity (hereinafter "the Union" or "N.M.D.U") and more than 50 newspaper publishers and publications distribution companies in the New York area, including the New York Times, New York Daily News, and New York Post.* After a proposed settlement was rejected by the Union membership, and after a Temporary Restraining Order was entered by the District Court (R. 48), these cases came on for a joint hearing on the plaintiffs' motion for a preliminary injunction. Before the hearing began, approximately 100 non-union, non-minority persons within the collective

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* The complaints of the Government and the private plaintiffs were similar, except that the private plaintiffs only named the four major New York City publishers as defendants and included a cause of action under 42 U.S.C. §1981, while the Government complaint also named numerous New York area small publishers and distributors of publications. Hereinafter, except as specifically indicated, the term "plaintiffs" shall refer to both the Government and the private plaintiffs. The Government initially filed its suit on behalf of the United States of America; however, pursuant to 42 U.S.C. 2000e-6(b), as amended, (Supp. II, 1970), the District Court entered an order substituting the Equal Employment Opportunity Commission as plaintiff. (R. 232).

bargaining unit represented by the Union, and working as extras for the Daily News, were permitted to intervene pursuant to Rule 24(a)(2), Fed. R. Civ. Pro., for the limited purpose of presenting evidence and argument "with respect to the narrow question of relief to be granted should the plaintiffs prevail." (R. 233, at 6).* The District Court later consolidated this hearing with the trial on the merits pursuant to Rule 65(a), Fed. R. Civ. Pro. (Tr. 3085),** and both cases were consolidated for all purposes nunc pro tunc to May 14, 1974 (R. 141).

Following the trial, but before the parties' post-trial submissions were to be filed, and before the Court rendered any judgment, all plaintiffs and defendants entered into a Settlement Agreement, dated June 27, 1974, which had been ratified by the Union membership (hereinafter "the Agreement"). The Agreement was immediately submitted to the Court for preliminary approval and for an order directing notice to the private plaintiff class pursuant to Rule 23(e), Fed. R. Civ. Pro. (R. 91). After

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* An appeal from the District Court's order limiting intervention has not been taken.

** Tr. refers to the transcript of the record of the trial on the merits (R. 148 D-G).

notice to all parties, the District Court held a hearing on July 15, 1974, (R.260), and by subsequent order established a briefing and argument schedule on the question of approval for the Agreement, and directed that notice be given to the class. (R. 110).

On August 27, 1974, the District Court held two hearings: one to determine the fairness and adequacy of the Agreement with respect to the class beneficiaries, and another to consider objections raised by any of the intervenors (R. 261).* By Memorandum Opinion and Order (hereinafter "Op.") dated September 19, 1974, (R. 137), 8 E.P.D. ¶9736, which constitutes the Court's findings of fact and conclusions of law, and by Supplemental Opinion and Order dated September 30, 1974 (R. 142), 8 E.P.D. ¶9737, the District Court approved the Agreement and appointed an administrator. On October 25, 1974, the District Court entered the Final Order and Judgment pursuant to which the Agreement (attached thereto as Exhibit A) became effective on November 11, 1974.**

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* Intervenors' application for certification of their own class, which was opposed by plaintiffs (R. 113, 115, 250), was denied at that time (R. 261, at 48). No appeal from that denial has been taken.

** Intervenor-appellant Larkin's motion for a stay pending appeal was denied by the District Court by Order and Endorsement on October 30, 1974 (R. 146) and by this Court on November 6, 1974.

B. The N.M.D.U. and the Newspaper and Publications Delivery Industry.

The following facts were found by the District Court and are essentially not disputed by the intervenor-appellant:

The Union is the exclusive bargaining agent for the collective bargaining unit encompassing all work performed in the delivery departments of newspaper publishers and publication distributors in the New York City area. The Union's geographic jurisdiction includes New York City, the New York counties of Nassau and Suffolk, the New Jersey counties of Bergen, Essex, Hudson, Middlesex, Monmouth, Passaic and Union, and the Connecticut county of Fairfield. Of the 4,200 union members, more than 99% are white. About 2,500 are now actively seeking work in the industry.

Because of variations in the size and quantity of publications to be distributed on a given day, employers' needs for delivery personnel vary from day to day, and shift to shift. Employers, therefore, depend on a regular work force with permanently assigned jobs (Regular Situation Holders) and daily extra shapers to cover extra work that is required. The daily shapers are divided into a four-tiered Group structure with descending daily hiring priorities. The Group structure, exclusive of Group II, also determines

the priority for filling Regular Situations as they become vacant.

Each employer has its own Group I list which has shaping priority at each shift, in order of shop seniority, and is limited to persons who once held a Regular Situation in the industry. These Group I shapers have either been laid off as a Regular Situation Holder by their current employer or by another employer, or have voluntarily transferred to the new employer's Group I list from positions as Regular Situation Holders or Group I shapers at another employer. The Group II list is an aggregate industry-wide list consisting of all Regular Situation Holders and Group I shapers, and it has daily hiring priority after each employer's Group I list is exhausted at a given shift. Individuals may use their Group II status to obtain daily extra work at any employer in the industry except their own. Each employer has its own Group III list which has shaping priority in order of shop seniority after all Group I and Group II men present at a shift are put to work. Experience is not a factor. All men, shapers and regulars, do the same unskilled work, but Group III shapers have never had a Regular Situation anywhere in the industry. Group IV shapers work after Group III and are only required to shape occasionally. When Regular Situations become vacant, they are offered first to Group I shapers in order of their shop seniority. When an employer completely exhausts his Group I list of shapers, it skips to the

Group III list to fill vacancies. Only then does a Group III shaper advance and get a Regular Situation.

The Union represents all delivery workers. However, a Regular Situation is normally required for Union membership, and therefore, Group III shapers have not been eligible to join the Union. The system is similar, but somewhat less structured, at the smaller publishers and at the wholesale distributors of publications. Presently 2,855 persons are actively seeking work in the industry, including 2,460 Regular Situation Holders, 123 Group I shapers, and 273 Group III shapers. Of these, only 70, or about 2%, are minority persons.* This contrasts to a relevant labor force that is 30% minority.**

The Union, founded in 1901, had no minority members and historically limited its membership to the first born legitimate son of a member. Until the aforementioned hiring system was adopted in rough form in 1952, the industry had a closed shop in which Union members were hired before or replaced non-union men.

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* As used herein, and in the Agreement, minority refers to Negro, Spanish-surnamed, Oriental or American Indian.

** The relevant labor force is based upon the fact that "the most reliable profile possible of the candidate for deliverers' work" is males over 16 years old with a high school education or less. Op. 24. See infra, at 51.

Moreover, after 1952,

> certain relevant provisions of the contract have been administered haphazardly, and . . . the Group structure has been circumvented by friends and family of Union members . . . . No non-Union Group III shaper in the industry has achieved a Regular Situation, and thus Union membership, by moving up the Group System since 1963. Op. 12-13.

C. The Settlement Agreement

The essential provisions of Agreement can be summarized as follows* (numbers in parenthesis refer to the paragraph in the Settlement Agreement):

Permanent Injunctive Relief

All defendant parties to this action are permanently enjoined from all practices which are intended to or would have the effect of discriminating against minority persons (¶¶1 and 2).

Back Pay and Fringe Benefits

Current minority employees of the major publishers will share in a $100,000 fund (¶37(A)(1)), the ultimate distribution of which will be approved by the Court (¶37(C)). Past minority employees of these publishers will share in a $5,000 fund (¶37(A)(2)). All

* The Settlement Agreement is attached as Exhibit A to the Final Order and Judgment (R. 145). The District Court's summary of it can be found at page 16 of its Opinion.

minority employees of the small publishers and news companies will share in a $5,000 fund (¶37(A)(3)). Each minority employee will be made whole by the Union and his own employer for full pension and welfare rights, when he retires, as if he had earned them from the time he entered the industry until the date he leaves the industry, up to and including 1973 (¶36).

Affirmative Action Plan

All parties are committed to a goal of 25% minority employment in this industry by June 1, 1979 (¶7). In order to achieve this goal, an Administrator (¶4), subject to the Court's review, will supervise and put into effect a specific and detailed Affirmative Action Plan, which will eliminate various informal practices and modify the collective bargaining agreements in order for the first time to guarantee to all extra shapers and new employees fair treatment and systematic advancement to permanent jobs in the industry. The principal elements of this Plan are as follows:

All new hiring into the industry will be on a ratio of three minority persons to two non-minority (¶15). Two named plaintiffs will be given regular jobs (¶9(b)(i) and (ii)), and the third will be put on the Group I list at the New York Daily News (¶9(b)(iii)). All incumbent minorities at the major publishers will be placed on the bottom of their employer's Group I list (¶9(a)(i)), and

at the Daily News they will be followed by an equal number of non-minorities from the Group III list (¶9(a)(ii)).

All employers with more than 20 delivery employees will create a Group III list if they do not now have one (¶21). These employers will add one person to the bottom of their Group I list from the top of their Group III list, each time they fill a regular situation (¶22). Except for an initial, interim provision for the News and the Post, for each regular situation filled by a major employer (defined as having more than 20 delivery employees) from his Group I list, the employer shall add to the Group I list one Group III person, alternating between minority and non-minority persons thereon, and add one person to the bottom of its Group III list (¶11).

The Agreement provides special, interim benefits in order to fairly and adequately deal with the large Group III list of the News. The News will initially add two Group III persons (one minority, one non-minority) to its Group I list for each regular situation filled, until its Group I list equals one hundred (¶12). Thereafter, until its Group I list again has 41 persons, or December 31, 1976, whichever occurs first, only one Group III person (alternating minority and non-minority) will be added

to its Group I list for every two regular situations filled (¶12). An interim requirement for News Group III shapers to work 120 days annually, if work is available, will insure further advancement for those really desiring to become full time, permanent News employees. The Post will immediately add nine persons (at least 6 minority) to the bottom of its Group I list (¶19 (b)(vi)). Its Group I list will be frozen until its membership is reduced to thirty-nine (¶13). After these interim provisions, the News and the Post will revert to the system at the other major employers.

Because transfers from one employer to another employer's Group I list virtually prohibited the advancement of Group III shapers into permanent Regular Situations, voluntary transfers are eliminated (¶18 and 19), and transfers from a person's employer will only be permitted by the Administrator in the event of certified economic layoffs, where no work is available from the Group I list at that employer (¶18). For each such transfer, one minority is added to the Group I list being transferred to (¶18(b)). If and when there are ten such transfers in a year, an equal number of non-minorities shall also go on the Group I list involved (¶18(b)). The plaintiffs henceforth shall be entitled to enforce the collective bargaining agreement provisions with respect to listing and work/shape requirements (¶35 (c)), and lists will be revised at frequent intervals in order to be maintained accurately (¶¶25 and 35(a)(1)).

Union Membership

Henceforth all those persons who are or will be listed on an employer's Group I list will be offered Union membership on an equal basis, with the option of installment payments for initiation fees (¶20).

D. The Opinion Below

In his decision, Judge Pierce concluded that the hiring system of the defendants, and the practices thereunder serve to "lock-in minorities at the non-Union entry level of the industry, and to thereby perpetuate the impact of past discrimination on the minorities . . . ." Op. 14. Accordingly, he further found that the Agreement's affirmative corrective relief was justified, and was a fair, adequate and reasonable means of assuring minorities their "rightful place" in this industry. Finally, he expressed confidence that "the plan is workable and can be implemented immediately," Op. 15., and would serve the public interest. Op. 24.

In reaching this judgment, Judge Pierce first found that the Union's pre-1952, practices of nepotism discriminated against minorities, Op. 12, and that the Group structure unlawfully maintained the effects of that discrimination, while continued abuses and nepotism exacerbated this already bad situation. Op. 12-14. He also found the Agreement's 25% minority employment goal justified by reliable and relevant labor force statistics,

as required by Rios v. Enterprise Ass'n Steamfitters Local 638, 501 F.2d 622 (2d Cir. 1974). Op. 24.

As to the intervenors' objections, Judge Pierce concluded that factually the Agreement did not trample upon, but rather enhanced, their work opportunities. Op. 18-20. Secondly, any interests of the intervenors were not legally "indefeasibly vested rights but were expectations derived from a bargaining agreement subject to modification. United States v. Bethlehem Steel Corp., 446 F.2d 652, 663 (2d Cir. 1971)." Op. 21. Finally, Judge Pierce ruled that the intervenors had no legal basis for obtaining relief such as that given to the minorities.

E. The Instant Appeal

One of the approximately 100 named intervenors,* James V. Larkin, a white Group III shaper at the Daily News, has taken an appeal from the Final Order and Judgment (R. 145), and asks this Court to invalidate the Agreement in its entirety, and require the plaintiffs to seek other, unspecified relief from the District Court based upon a judgment on the merits against the defendants. Appellant is proceeding in forma pauperis pursuant to an order of the District Court. (R. 147).

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* See R. 233, at 3; and R. 89, 238 and 239.

ARGUMENT

THE DISTRICT COURT PROPERLY EXERCISED ITS DISCRETION IN APPROVING THE SETTLEMENT AGREEMENT DESIGNED TO REMEDY THE EFFECTS OF THE DEFENDANTS' DISCRIMINATORY PRACTICES.

Appellant Larkin urges this Court to reverse the District Court's approval of the Agreement on the foll wing grounds: that he did not consent; that he was entitled to additional benefits; that the Agreement injured or treated him unfairly; and that the Agreement illegally deprived him of protected and vested rights. These arguments are completely without merit.

The District Court approved the Agreement after concluding that the defendants' past practices had violated the Act and had denied minorities equal employment opportunities. In light of the proven violations, the Agreement carefully provided for compensatory and affirmative relief, which was fair, necessary and lawful. Appellant was afforded every procedural right, was substantially benefitted by the Agreement (which guaranteed him advancement to a permanent job), and was not denied any benefit to which he was entitled.

Judge Pierce's approval of the Agreement was an exercise of his equitable power and broad discretion

to fashion appropriate relief, and to approve affirmative remedies to eliminate the vestiges of past discriminatory conduct.* See Louisiana v. United States, 380 U.S. 145, 154 (1965); Rios v. Enterprise Ass'n Steamfitters Local 638, supra; United Statesv. Wood, Wire and Metal Lathers Local 46, 471 F.2d 408 (2d Cir. 1973), cert. denied, 412 U.S. 939. As such, Larkin had the burden of persuading the District Judge that it would be an abuse of his discretion to approve the Settlement Agreement. Larkin failed to sustain that burden and Judge Pierce entered the Agreement as a District Court Order.

Ordinarily, this Court should not substitute its judgment for the District Court's. "The framing of decrees should take place in the District rather than Appellate Courts." International Salt Co. v. United States, 332 U.S. 392, 400 (1947); Vulcan Society v. Civil Service Commission, 490 F.2d 387, 399 (2d Cir. 1973); Coalition for Ed. in Dist. 1 v. Board of Elections, 495 F.2d 1090 (2d Cir. 1974); Chance v. Board of Examiners, 458 F.2d 1167, 1178 (2d Cir. 1972). Where, as here, the District Court has approved a Settlement Agreement, the scope of review in this Court is correspondingly narrow. It is

* Ipso facto, the parties have equal or greater discretion to fashion relief upon consent, and this would be true even after a Court finding of liability for a violation of Title VII. The Court need only be satisfied that the relief consented to is lawful, and the requirements set forth at p. 17, infra, are met. United States v. Simmonds Precision Products, Inc., 319 F.Supp. 620 (S.D.N.Y. 1970).

"well settled that in reviewing the appropriateness of the settlement approval, the appellate court should only intervene upon a clear showing that the trial court was guilty of an abuse of discretion." West Virginia v. Chas. Pfizer & Co., 440 F.2d 1079, 1085 (2d Cir.), cert. denied, 404 U.S. 871 (emphasis added).

The District Court's role in approving the Agreement was a limited one.* It was not to substitute its judgment for that of the parties, but was simply to assure that the settlement was fair and equitable to the class and the parties; was a reasonable resolution of the dispute; and was in the public interest to enter as a court decree. West Virginia v. Chas. Pfizer & Co., 314 F.Supp. 710 (S.D.N.Y. 1970), aff'd, supra; Glicken v. Bradford, 35 F.R.D. 144, 148 (S.D.N.Y. 1964); United States v. Carter Products, Inc., 211 F.Supp. 144, 147-48 (S.D.N.Y. 1962).

The District Court could not rewrite the settlement to conform to its own preferences, but had to base its determination upon legal not administrative considerations. United States v. Automobile Manufacturers Ass'n,

* Of course, such approval is a judicial act having the same force and effect as a judgment following a trial, and is a final adjudication. United States v. Swift, 286 U.S. 106 (1932); Pope v. United States, 323 U.S. 1, 12 (1944); A.D. Julliard & Co. v. Johnson, 166 F.Supp. 577 (S.D.N.Y. 1957), aff'd, 259 F.2d 837 (2d Cir. 1958), cert. denied, 359 U.S. 942 (1959).

307 F.Supp. 617 (C.D. Calif. 1970), aff'd per curiam sub nom. City of New York v. United States, 397 U.S. 248. Accordingly, the Court does not ordinarily reach conclusions as to the underlying facts or legal merits of the action. Newman v. Stein, 464 F. 2d, 689, 691-93 (2d Cir.), cert. denied, 409 U.S. 1039 (1972).

Of course, the private resolution of disputes is a desirable outcome of any lawsuit, if possible, and nowhere is this more clearly the case than in disputes under Title VII of the Act. See, e.g., Culpeper v. Reynolds Metals Co., 421 F. 2d 888, 891 (5th Cir. 1970). Judge Pierce also recognized that in this case "even at this late stage public policy is served by an agreement rather than an adjudication." Op. 8. However, because of the strong public interests and the sensitivities of the issues involved, and in light of his unique position, having presided over a four-week trial, Judge Pierce engaged in a thorough and searching discussion of the merits, weighing all of the equities among the competing interests, after which he issued findings of fact and conclusions of law approving the Agreement.

Judge Pierce found

> that the plan is a result of hard, serious and good faith negotiations, and that the different pressures, perspectives and interests of the parties have been confronted and already resolved. This serves to increase the Court's confidence that the plan is workable, and can be implemented immediately. Op. 15.

The Agreement provides extensive affirmative relief eliminating the offensive restraints on minority employment which formed the basis of the initial charges, and prohibits future violations. Only countervailing considerations of a substantial nature would justify withholding approval of the relief provided by the Agreement. United States v. Carter Products, Inc., supra.

A. Plaintiffs Would Have Been Entitled To A Judgment Against The Defendants For Violations Of The Civil Rights Act Of 1964, If This Case Had Not Been Settled.

If this matter had not been settled after trial, there can be no doubt that on the basis of the proof offered, the plaintiffs would have been entitled to a judgment of liability against the defendants for violating the Act.

"Under the Act, practices, procedures, or tests neutral on their fact, and even neutral in terms of intent, cannot be maintained if they operate to 'freeze' the status quo of prior discriminatory employment practices." Griggs v. Duke Power Co., 401 U.S. 424, 430 (1971). In approving the Agreement, Judge Pierce actually concluded that the defendants engaged in such practices, and therefore Title VII had been violated.

For example, he concluded

> that the nepotistic policy of the Union prior to 1952 resulted in discrimination against minorities.... The effect of such policies, deliberate or not, was to foreclose minorities from employment in the industry. Op. 12.

He went on to analyze events since 1952, when the supposedly neutral Group structure was instituted, and concluded that

> the clear inference from these [minority employment] statistics is that abuses of the Group structure and indeed the Group structure itself, is serving--however unintentionally--to "lock-in" minorities at the non-Union entry level of the industry, and to thereby perpetuate the impact of past discrimination on the minorities with whom these Title VII actions are concerned. It is this present impact of past practices which justifies the affirmative, corrective relief embodied in the Settlement Agreement. See, Griggs v. Duke Power Co., 401 U.S. 424 (1971); Rios v. Enterprise Association Steamfitters Local 638, supra; United States v. Wood, Wire and Lathers Local 46, supra (sic.); United States v. Bethlehem Steel Corp., 446 F.2d 652 (2d Cir. 1971). Op. 14-15.

These ultimate conclusions are amply supported by the record before the District Court.

The proof demonstrated that the industry and the Union are about 1-2% minority, while the minority population in the relevant labor pool in the geographic area of the defendant employers is about 30%,* and the District Court so found. Op. 13 and 24. This discrepancy

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* A detailed analysis of the evidentiary basis for these figures can be found at the Government's Proposed Findings of Fact Nos. 34-38. (R. 116.) See infra, at 51.

established a prima facie case of discrimination, placing upon the defendants a heavy burden of affirmatively proving no violation of the Act. Griggs v. Duke Power Co., supra, 401 U.S. at 432; Chance v. Board of Examiners, supra, 458 F.2d at 1176 (2d Cir. 1972); United States v. Ironworkers Local 86, 443 F. 2d 544 (9th Cir. 1971), cert. denied, 404 U.S. 984 (1971); Parham v. Southwestern Bell Telephone Co., 433 F. 2d 421 (8th Cir. 1970).

The defendants made no showing, nor could they. Plaintiffs' proof conclusively established a violation of the Act. Prior to the abolition of closed shops by the Labor Management Relations Act, 1947, 29 U.S.C. §§ 141 et seq., Union men had job priority over non-union men, and since the white Union limited membership to first born legitimate sons of members, both the Union and the industry were almost exclusively white. Op. 11-12.* When the modern hiring practices were adopted, they only served to perpetuate that status quo. The men holding Regular Situations (then and now, almost all white) were given security and priority status in the industry, because only they had access to the Group I lists. This meant that when there were layoffs or men desired to transfer shops, they were placed ahead of Group III men. Therefore, these men were closer to extra

* See, e.g., Tr. 78, 79, 83 and 119; and N.L.R.B. v. Gaynor News Co., 347 U.S. 17 (1953).

daily work and to obtaining Regular Situations again. Moreover, all Regular Situation men and Group I men (almost all white) had the luxury of obtaining additional work by shaping from the Group II list ahead of Group III men. Op. 10-11.*

The effect of this system on minorities is obvious. On a long range basis, in terms of permanent employment, no minority person not already a Union member and therefore a previous holder of a Regular Situation, has been eligible for a Regular Situation from the Group III list at the major publishers since before 1963.** In the short run, in terms of daily, temporary employment, almost all minorities seeking work for the first time in the industry, in order to break the white stranglehold on jobs would at best be on the Group III lists, where the least work is available.

Therefore, since the system itself inevitably denied minorities work and perpetuated past discrimination, excluding minorities from the industry and the Union, it is clear beyond peradventure, particularly in this Circuit, that this employment system itself was unlawful under the Act. Griggs v. Duke Power Co., supra; Rios v. Steamfitters Enterprise Ass'n Local 638, supra; United States v. Wood, Wire and Metal Lathers Local 46, supra; Jones v. Lee Way

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* Tr. 80-92, 121; Px 2a-2e (hereinafter Px refers to plaintiffs' trial exhibits which are designated at R. 262).

** Tr. 144, 152 and 961; Px 3a-3f, 5, 7(b), 9, 15 and 16; R. 121 and 123.

Motor Freight, Inc., 431 F.2d 245 (10th Cir. 1970); United States v. Dillon Supply Co., 429 F.2d 800 (4th Cir. 1970); Local 189, United Papermakers and Paperworkers v. United States, 416 F.2d 980 (5th Cir. 1969), cert. denied, 397 U.S. 919 (1970); United States v. Sheet Metal Workers Local 36, 416 F.2d 123 (8th Cir. 1969).

Plaintiffs' proof also established other unlawful practices besides the collective bargaining agreements themselves. After 1952, the Union still maintained a policy of favoring Union members, thereby necessarily favoring whites. Op. 13. The Union's business agents and officers were most familiar with the job situation at the smaller companies, especially those outside the central city, where the working hours are late at night. When jobs opened at these places, the Union knew first, and inevitably the jobs were filled by a Union man or his friend, always white. Se Op. 13.

The testimony at trial revealed repeated instances where whites on the Group III list at a major publisher's disappeared from the Group III list, and later returned, only this time on the Group I list ahead of most minorities, and claiming they had been laid off from a small news company. See, e.g., Tr. 965. In one instance, James Fello, president

of East Island News Co., testified that as a favor to the Union, he wrote a false discharge letter for two employees so they could get the more lucrative work from the Group I list of a major employer. Tr. 1595-97. In another instance, Lang News Co. had to give work to white men ahead of a minority shaper simply because they were members of the Union. Px 60(a); Tr. 744-46.

The Union also continued the practice of admitting persons to the Union solely because they are related to members. Px 3a-3f; Tr. 226-27, 244. Of approximately 600 new members admitted to the Union between January 1, 1965, and January 1, 1973, 221 were admitted solely because they were in the immediate family of a member. Px 3a-3f. This, of course, in and of itself discriminated against minorities and is unlawful. United States v. Woods, Wire and Metal Lathers Local 46, 341 F. Supp. 694 (S.D.N.Y.), aff'd, supra; Local 53, Asbetos Workers v. Vogler, 407 F.2d 1047 (5th Cir. 1969).

However, the violation was compounded, because these nepotistic card members on various occasions obtained daily work ahead of minorities without any right to do so under the collective bargaining agreements.

Tr. 1954-55, 1466-68. Also, a great many of them obtained Regular Situations or Group I status fairly soon after their admission to the Union. Px 3a-3f, 7(b). Obviously, they were the beneficiaries of Union preferences which were detrimental to minority work opportunities and unlawful. The net effect of both the contracts and the abuses thereunder was that since the passage of the Act, large numbers of white persons obtained Regular Situations at both major publishers and small news companies, but very few minority persons did.*

Furthermore, with respect to the Daily News, appellant's employer, because minorities were also markedly under-represented on the News' Group III list, the ourden upon the Union and the Company was not limited to the problems in Regular Situations or Group I listing. There were only 13 minorities out of 174 Group III shapers, or about 7.5%. (R. 123). In the face of a relevant labor pool for the News that is 30-33% minority, these statistics also established a prima facie case of discrimination as to listing on the News Group III list. See supra, at 21, and cases cited therein.

In the face of this discrepancy, no satisfactory response was forthcoming at trial from either the News or the Union. Instead, the plaintiffs' proof established an unfavorable explanation. Minorities had

* Px 3a-3f, 5, 7(b), 9, 15, 16; Tr. 144, 152, 961; R. 116, at Proposed Finding No. 35; and R. 121, 123.

a harder time gaining entrance to the Group III list. Tr. 1531-32, 1573-74. They were naturally more easily discouraged in the face of an all-white Union leadership, an almost all-white group of supervisors and a virtually solid block of white workers ahead of them. Even if they were on the Group III list, there were numerous instances of whites on the Group III list disappearing, apparently working a short while at a news company, and then suddenly appearing again at the News, but this time on the Group I list. In addition to these abuses, they faced a system which inherently worked to lock in the existing all-white labor force and the white Union membership, by making it difficult for minorities to obtain daily work, and next to impossible ever to get a regular job.

B. THE AGREEMENT, INCLUDING THE USE OF NUMERICAL AND PERCENTAGE HIRING GOALS, IS EQUITABLE, IN THE PUBLIC INTEREST, AND LAWFUL.

The District Court had broad discretion to approve a remedy fashioned by the parties designed to eliminate the vestiges of past discriminatory conduct. See cases cited supra, at 16. It found that "the affirmative relief provides members of the plaintiffs' class and other minorities with an adequate, fair and reasonable route to their "rightful place" in this industry." Op. 24. The adequacy of the Agreement's

treatment of minorities is not an issue now before this Court, since the only appellant is a white, non-member of the Union.

Appellant Larkin is one of about 100 non-minority Group III extra shapers at the New York Daily News who were allowed to intervene in the District Court.* No other intervenor has been so dissatisfied with the benefits he obtained from the Agreement that he has appealed the District Court's approval of the Agreement. Given the benefits flowing to all of the intervenors from the Agreement, as set forth infra, at 31-36, this turn of events is understandable. Mr. Larkin is currently one of about 178 Group III shapers at the Daily News** and one of about 270 in the industry; he is one of about 910 delivery workers at the Daily News and one of about 2860 workers in the industry at more than 50 companies. Nevertheless, he asks this Court to find that the District Court abused its discretion in approving the Agreement, which was painstakingly worked out by the Government, private plaintiffs, the Union and more than 50 employers, and which alters the interests and expectations of all of these 2800 employees in order to remedy the effects of discriminatory practices and help

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* R. 233, at 3; R. 89, 238 and 239

** During the six months from the filing of the first intervention pleadings until Judge Pierce issued his opinion, over forty News Group III shapers were delisted for failure to meet the contract's work/shape requirements.

minority workers, while benefitting the group of intervenors.

1. APPELLANT LARKIN IS TREATED EQUITABLY.

To the extent that appellant Larkin seeks affirmative relief for himself as a non-minority shaper,* his argument is without merit. A federal district court, even sitting as a court of equity, cannot exercise its power to benefit a litigant unless a cause of action is pleaded which warrants a claim for relief. Intervenor's amended complaint. (R. 239), alleges no such basis for affirmative relief, nor could it.

The District Court correctly concluded that in this Title VII action, there was no legal foundation for Larkin's request for affirmative relief, even assuming Larkin's characterization of the impact of industry practices on Larkin is accurate, because the proof failed to show any of the whites were ever victims of discrimination prohibited by Title VII. Op. 22-23. United States v. Bethlehem Steel Corp., supra, 446 F.2d at 6[illegible] Larkin's reliance on United States v. Roadway Expres[illegible]c., 457 F.2d 854 (5th Cir. 1972), is misplaced.

* Appellant's Brief (hereinafter "Br."), at 4-7.

** In fact, the relief generously afforded intervenors by this Agreement is similar to that which was rejected by the Bethlehem court as too generous to comparably situated white parties there.

The Court there approved a Title VII settlement agreement which voluntarily granted some benefits to white non-union workers, over the objections of white union workers who were trying to dissent from their union's consent. The Court there did not require that the benefits actually provided, or indeed that any benefits, had to be provided the non-union whites. That is exactly what happened here. In the instant case, the Agreement does grant some benefits to minorities not granted to Larkin: for example, pension and back pay benefits. However, Larkin has no right to such benefits.

Other aspects of the Agreement against which Larkin apparently complains, such as a conditional yearly work requirement of 120 days, ¶10(d), are simply non-discriminatory changes in Larkin's terms and conditions of employment, which the parties agreed would serve the overall objectives of the settlement, and which were well within the District Court's discretion to approve. This provision will actually help Larkin by delisting those ahead of him on the News Group III list who do not really want steady work as a deliverer.

As to the remainder of Larkin's objections to the Agreement, they are based upon two fallacious contentions: one, that factually the interests of Larkin and other intervenors are harmed by the relief granted to

minorities; and two, that such an impact is unlawful. Larkin's primary objection seems to be to the Agreement's provisions which add recently recruited minorities to the News Group I list on a one-to-one basis with non-minorities from the News Group III list. He argues that somehow this provision deprives him of his current employment rights and expectations and therefore constitutes unlawful "bumping" of whites presently on the News Group III list. The factual premise of this argument is false, because as Judge Pierce found, there is no "bumping." Instead, these whites will gain previously non-existent rights, security and opportunities by virtue of the Agreement, and will suffer no adverse effects. In sum, Judge Pierce found the Agreement was equitable.

These findings of Judge Pierce must stand, unless Larkin can establish they are clearly erroneous. This rule also applies to factual inferences from undisputed basic facts. Commissioner v. Duberstein, 363 U.S. 278, 291 (1960). This Court should not upset such findings without a "definite and firm conviction that a mistake has been committed." Coalition for Ed. in District 1 v. Bd. of Elections, supra, 495 F.2d at 1094, quoting United States v. United States Gypsum Co., 333 U.S. 364, 395 (1948).

Since the District Court's findings on this

subject are dispositive of Larkin's objections, they are, therefore, worth citing at length.

> [T]he Agreement will operate beneficially for the intervenors as well as for the minorities. Op. 17. [it] . . . simply does not trample on their employment opportunities. In the long run, it must be acknowledged by all concerned that the effect of this Agreement, if it operates as predicted, will be to achieve Regular Situations or Group I status for all members of Group III, minority and non-minority alike, within a relatively short time-span. Without this Settlement, Group III workers had little if any hope of ever achieving either status under the present system. Op. 18-19.

The enormous improvement such a change in status would mean was also noted by the Court:

> [O]nce a Group III non-minority is elevated to Group I, his daily shaping opportunities will be no less than they presently are and indeed they may be greater. The News projections submitted to this Court indicate that within a month after implementation of the plan, the non-minority who is number 47 on the Group III list, and all non-minorities above him, will have been elevated to Group I. The progression thereafter is expected to be approximately 27 non-minority persons to Group I each year. Op. 19.

Furthermore, the Agreement

> provides other benefits to Group III non-minorities, not the least of which is the appointment of an administrator who is empowered to assure that existing work opportunities in the industry shall be made available to any Group III person unable to get at least 45 shifts of work in any calendar quarter. Op. 19.

What Larkin fails to realize, and what Judge

Pierce so carefully determined, is that the Agreement's impact on the intervenors is not to be judged in comparison to some idealized preferences for benefits that the intervenors would have chosen for themselves. Instead, it can only be compared to the practical realities of the intervenors' present and past circumstances. In that regard, the intervenors started with very little.

> [R]egardless of the priority structure of the present contract, and the language which may be used in it, the fact remains that Group III workers do not have full-time employment, nor do many of them have any great expectations or intention of working full-time while they shape from the Group III list. They are shapers. And, to the extent that the present contract structure, in theory, gives them certain priorities, by tenure on Group III, to achieve Regular Situations, the facts have demonstrated that they could not have any realistic expectation of such movement actually occurring. As noted above, no Group III worker has moved up the list to a Regular Situation since 1963. Op. 21 (emphasis added).

As to daily work practices

> [w]hen an additional person is placed in front of a shaper, theoretically his chances of working any particular shift are decreased by a factor of one job. This, of course, depends on the stability of the total number of jobs available from shift to shift and whether or not the new person chooses to shape the same shift. In other words, assessing a shaper's expectation is a highly speculative exercise. The Court does not mean to minimize a Group III member's vested emotional interest in his position at a shaper, but it cannot be equated with the worker who might be "bumped" from a steady and seemingly secure position by

an outside minority with less seniority than him. Op. 21 (emphasis added).

Judge Pierce's findings of fact are well illustrated by a simple example. In essence, over the long run under paragraphs 11 and 12 of the Agreement the News must add to its Group I list from its Group III list, one minority person and one non-minority person for every two positions open thereon.* This right to advance to the Group I list is a benefit never enjoyed before by Group III shapers, despite years of efforts, including lawsuits and N.L.R.B. proceedings.**

The resulting effect of this mandatory advancement on Group III whites is as follows: if there are 40 Group I members, a white person who is now number 40 on the Group III list has 79 persons (exclusive of Group II shapers) potentially shaping daily ahead of him. Under the provisions effective at the News, if 10 Regular Situations become vacant and are filled from the Group I list, 5 white persons senior to the Group III No. 40 man, and 5 minority persons from the Group III list,

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* This is the permanent procedure at the New York Times and other major employers, which the News will eventually adopt. It is an average of what the News will do in the short range. In light of the large News Group III list, special beneficial provisions are applicable at the News in the interim. The News Group I list will expand from 40 to 100, so that for every one opening thereon created by the filling of a Regular Situation, a non-minority Group III Shaper like Larkin will move up at the same time a minority shaper moves up.

** See, e.g., N.L.R.B. v. Gaynor News Co., 347 U.S. 17 (1953); Px 10, 11-11d, and 12-12d.

who may or may not be senior, will go to the Group I list. The result is that on a daily basis at most 74 persons now will be ahead of this No 40 Group III man for available extra work (40 group I's and 34 Group III's).* In other words as to daily work opportunities, at a minimum, for each regular situation filled, a Group III white person will move one half step up the seniority ladder to Regular Situation status.

Under prior practices such movement never really happened. As Regular Situations were filled from the Group I list, Group III shapers would have higher daily priority only if no additions were made to the Group I list, and would get Regular Situations only if at some point in time the Group I list were completely exhausted. But no such advancement occurred. Voluntary or hardship transfers and fraudulent layoffs from one employer to another time and again flooded the Group I list, decreasing daily work opportunites and eliminating the hopes of Group III shapers for getting a Regular Situation.

For example, since 1963, the News has filled over 400 Regular Situations. Tr. 960. However, none of

* In addition, some Group II shapers who now work behind the hypothetical 40 Group I members will undoubtedly shape less frequently when they have to work behind the new Group I list which should be 75-100 instead of the current 41, pursuant to paragraph 12 of the Agreement. See R. 123.

these permanent jobs went to a Group III shaper, and nothing was before the District Court to indicate that the intervenors' prospects for the future were any brighter. Thus, if the status quo were maintained, the intervenors would remain frozen in Group III. The Agreement, however, restricts any future expansions of the Group I list due to such transfers (¶¶18 and 19) and mandates promotions to the Group I list from Group III shapers. For the first time in ten years there is a real opportunity for advancement. By no stretch of the imagination can such relief be considered "bumping".

Moreover, as a white Group III person works his way up that Group III list, he must eventually advance to the Group I list. See R. 123. Such promotion to the Group I list further improves the intervenors' daily work opportunities. It gives them seniority over persons transferring to the News Group I list from another employer because of legitimate layoffs; it allows them to work ahead of Group II listees; and it promotes them <u>one full</u> position in senority up the Group I list for each Regular Situation filled thereafter. Finally, promotion to the Group I list will assure promotion into Regular Situations for the Group III white persons. Since such promotion was only theoretically available in the past, the intervenors have gained

another benefit, and have not been "bumped."*

In summary, as to the new rights and benefits created by the Agreement in order to vitiate the effects of past practices affecting minorities, in all major respects, the Group III whites, as a group, will benefit equally with the minority persons: each time a minority person changes position on a list, a white Group III person will also move exactly the same way. In the process, all intervenors will gain daily work opportunities and be guaranteed promotion to permanent jobs. It is a twist of logic to call that "bumping". Larkin's complaint on appeal is simply that his relative position has not improved as much as he would have preferred; the Agreement is not as ameliorative as he might have hoped. That, however, is not a legally cognizable grievance.

2. The Remedy Adopted Is Lawful.

Larkin claims Judge Pierce's approval was unlawful because it deprived him of his procedural rights as an intervenor, and its hiring goals granted unjust

* The importance of the appointment of an Administrator to supervise the implementation of the Agreement, should not be underestimated. Serving as an impartial arbiter responsible to the Court under the Agreement, he will be able to protect the intervenors' interests.

advantages to minorities in violation of Larkin's rights under 42 U.S.C. § 2000e-2(j).* No withstanding Larkin's objections, there were no procedural defects in the proceedings below, and the affirmative relief provided by the Agreement fits well within the boundary and pattern of relief adopted by courts in a multitude of Title VII cases. See Rios v. Enterprise Ass'n Steamfitters Local 638, supra, 501 F.2d at 629 and 631 and cases cited therein.

Procedural Objections

Larkin asserts that his status as an intervenor deprived the District Court of its normal power to approve and adopt the Agreement, at least without Larkin's consent. (Br. at 31-32). There are several short answers to this contention. First, Larkin overlooks the limited nature of his intervention. Judge Pierce's order granting intervention foreclosed Larkin from participating in

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* This Section reads in pertinent part:

> Nothing contained in this subchapter shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this subchapter to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national orgin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer, ... in comparision with the total number of percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area.

the case unless and until there was a judicial finding of liability. Larkin was permitted to intervene pursuant to Rule 24(a)(2), Fed. R. Civ. Pro., because of his potential interest in the relief to be fashioned. The District Court expressly barred intervention on any claims of independent rights under Title VII, or any other provisions of law. (R. 233, at 7-8). No appeal from the order limiting intervention has been taken. Since the original parties were able to agree upon a resolution of their differences without requiring Judge Pierce to make a binding determination of whether there had been violations of Title VII, the precondition to Larkin's active participation in the action never occurred. Accordingly, Judge Pierce entertained Larkin's objections as a matter of discretion, not right, and he was free to accept the Agreement qua settlement, even absent the intervenors' consent.

Second, even if Judge Pierce's order granting intervention conferred upon Larkin the right to be heard with respect to the relief to be adopted, whether by stipulation or by imposed judicial decree, nonetheless Larkin was afforded his full procedural rights under the District Court's order. All persons affected by the proposed settlement were given an opportunity to appear and comment on the proposals at a hearing, and Judge Pierce did not rule until

after he had given due consideration to Larkin's objections. In short, the District Court's order granting intervention did not require that Larkin be given a substantive right to veto settlement proposals submitted by the other parties; rather, it granted to the intervenor the right to be heard with respect to the effect any prospective decree would have on the rights and interests of white Group III shapers at the Daily News. In this respect, the settlement procedure adopted by the District Court fully comported with its earlier intervention order. Having considered the position of the intervenors, Judge Pierce was still free to approve the Agreement. See, e.g., United States v. Roadway Express, Inc., supra; and United States v. Simmonds Precision Products, Inc., supra.

Finally, even if Larkin and the other intervenors enjoyed both substantive and procedural rights equivalent to those of the original parties, the Agreement should nevertheless be sustained, because the District Court found sufficient facts to support its conclusion of discriminatory employment practices by the defendants, and accordingly was empowered as a matter of law to impose the relief requested by the parties in their Agreement. See discussion infra, at 40-51. Larkin relies on this Court's conclusion in Ray-Lite Corp. v. Noma Electric Corp., 170 F.2d 914 (2d Cir. 1948), that a compromise between parties could not

affect an intervenor's prior existing, independent rights because "an intervenor comes into the case in the condition at which it stands at the time of the intervention," Id., at 915 (emphasis added); however that is not to the contrary of this case. The District Court found here that no substantive legal interests of Larkin's were unlawfully affected by the Agreement.

For these reasons nothing in Rule 24, Fed. R. Civ. Pro., or the District Court's order granting intervention, required the Agreement to be rejected merely because one of the intervenors, James Larkin, did not consent to all of its provisions.

Substantive Objections

Larkin's assertion that his rights under 42 U.S.C. § 2000e-2(j) have been violated is also mistaken. The Agreement adopts a goal of 25% minority employment as Regular Situation Holders and Group I shapers by June 1, 1979. The goal is implemented by requiring that three of every five additions to the lowest hiring lists must be minority group members; that one of every two additions required to be made to Group I lists from Group III lists must be a minority group member; and that Group III men be regularly elevated to Group I status. It is against these affirmative hiring goals that Larkin principally complains.

It is now the settled law in this Circuit that racial hiring goals are necessary and appropriate remedies to insure that minorities will obtain job positions they would have had absent practices currently excluding minorities or perpetuating effects of a prior exclusion of minorities from employment. Rios v. Enterprise Ass'n Steamfitters Local 638, supra; Vulcan Society v. Civil Service Comm'n, supra; Bridgeport Guardians, Inc. v. Bridgeport Civil Service Commission, 497 F.2d 1113 (2d Cir. 1974), aff'g relief granted by the District Court on remand from 482 F.2d 1333 (2d Cir. 1973); United States v. Wood, Wire and Metal Lathers Local 46, supra.

As shown above, Larkin's lost expectations, if any, are not of sufficient weight to override the goal of ending and remedying the discrimination in this industry. In any event, Judge Pierce was correct in recognizing that Larkin's prior expectations, assuming arguendo they are realistic, "are not indefeasibly vested rights but mere expectations derived from a bargaining agreement subject to modification." Op. 21, quoting United States v. Bethlehem Steel Corp., supra, 446 F.2d at 663. These expectations can be modified at any time by Larkin's exclusive bargaining agent, the Union, and this possibility is clearly

contemplated by the contract.* Moreover, it must be remembered that in extending benefits to minorities and intervenors by the Agreement, the Union compromised the contractual rights of Regular Situation Holders and Group I shapers, by eliminating voluntary and hardship transfers and severly restricting transfers resulting from layoffs.

Such expectations may be frustrated by court decree where affirmative relief is necessary to remedy the effects of discriminatory employment practices. This principle has been consistently upheld in numerous cases where majority persons similarly situated to Larkin have been arguably aggrieved by relief as strong as, or even stronger than, the provisions of the Settlement Agreement challenged here.

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* The contracts themselves explicitly allow for the possibility that the Union as exclusively bargaining agent may have to agree to modify the contract to conform to the law or a court order. For example, the major publishers' contract provides:

> Should any provision of this contract, at any time during its life, be in conflict with federal or state law or regulation by reason of the passage of any statute, rule, or regulation after the execution of this agreement, or by reason of any decision, ruling or decree by any tribunal of competent authority made after the execution of this agreement, then such provision shall become inoperative, either upon agreement by the parties that such conflict exists, or upon a determination to that effect by the Appeals Board. Px 2a, at 64.

Nothing in 42 U.S.C. §2000e-2(j) is to the contrary or prohibits the relief approved here. What Larkin fails to realize is that the Agreement does not merely correct an "imbalance" in statistics; instead it remedies exclusionary employment practices which violated equal employment rights protected by Title VII. Accordingly, since Judge Pierce concluded that the Agreement was necessary to remedy the defendants' employment practices, and was in the public interest, he was correct in holding that therefore none of Larkin's civil rights were violated.

In Rios v. Enterprise Ass'n Steamfitters Local 638, supra, the union had an A branch and a B branch, both with whites and minorities. The A branch members had higher work priority and pay than the B branch members, some of whom were waiting to get into the A branch. The District Court held that the union had artificially and unlawfully restricted entry into the A branch to benefit relatives and friends of A branch members, much the way the defendants here restricted entry into the Union, into Regular Situations, and into Group I positions. Such restrictions generally applied equally to whites and minorities in the B branch, as the restrictions here in some respects equally applied to non-union whites and minorities. Nonetheless, this Court upheld the District Court's final order, which, inter alia, provided for

direct admission of persons from the B branch, or from outside the union, to the A branch on a ratio of one minority to one white. Seniority of status in the B branch or in the industry was irrelevant, as was the existing proportion of whites to minorities in the B branch. Since that remedy is virtually identical to the one approved here, Rios requires affirmance in the instant case.

In Vulcan Society v. Civil Service Comm'n, supra, this Court affirmed the District Court's use of a 3:1 majority to minority hiring ratio for the New York City fire department from a list of candidates who passed an invalidated exam. This was done over the objections of intervening white candidates who passed the exam, who argued that they had not been guilty of any discrimination; that they were similarly situated to minority candidates; and that a 7:1 ratio should be used instead, because "the ratio of whites to minority members who took the examination was 8:1 and that only a slight adjustment in that figure is needed to take account of improper disparities in appointments already made." Id. at 398.

In rejecting this argument, this Court acknowledged that Judge Weinfeld's ratio did not rest on any scientific basis, but determined "the judge took appropriate account both of the resentment of non-minority

individuals against quotas of any sort and of the need of getting started to redress past wrongs." Id., 490 F.2d at 399. The Government submits that Judge Pierce similarly weighed the relevant and competing interests, and that, as in Vulcan, this Court should not substitute its judgment for the District Court's.

Appellant's argument heavily relies on some broad language in this Court's first decision in Bridgeport Guardians, Inc. v. Bridgeport Civil Service Comm'n, supra, 482 F.2d 1333 (2d Cir. 1973), and in United States v. Bethlehem Steel Corp., supra, to support his claim that the hiring goals adopted here are unlawful as "bumping" or "super-seniority." Careful analysis of those cases demonstrates such reliance is unjustified.

The Bethlehem court never ruled on the questions of "bumping" or "super-seniority", because under the Government's order approved by this Court in reversing the district court, "an employee [would] not be 'bumped' out of his job in such situations by a [minority] transferee." Id., 446 F.2d at 664; nor would "any employee have super-seniority or be entitled to a job for which he is not qualified." Id., 446 F.2d at 666. See Williamson v. Bethlehem Steel Corp., 468 F.2d 1201, 1205 n.4 (2d Cir. 1972).

However, this Court's holdings in Bethlehem require affirmance here. First, the district court was

reversed for not granting the Government's request for seniority carryover and rate retention for minority victims of Title VII discrimination desiring to transfer to another department within the company. This reversal occurred in order to further enhance minority opportunities, although white persons would not have the same rights of higher pay and plant seniority, even if their position in the company were identical to that of the minority transferees in question or they were not beneficiaries of discrimination. See Id., 312 F. Supp. 977, 994-95 (W.D.N.Y. 1970).

Secondly, the Court concluded that no "bumping" would occur, because the special minority "plant seniority will only be used in bids upward for vacancies occurring in the normal course of business, i.e., vacancies caused by the death, retirement or transfer of an incumbent or by creation of a new job." Id., 446 F.2d at 664. Since that exact condition is used here to trigger the 1:1 promotions to the Group I list and the 3:2 placements on the Group III list, and since no openings on the Group I list for Group III shapers have even before existed under the contracts, this affirmative relief should also be approved.

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In its first decision in Bridgeport Guardians, Inc. v. Bridgeport Civil Service Comm'n, 482 F.2d 1333 (2d Cir. 1973), this Court upheld the imposition of minority hiring quotas at the patrolman's entrance level and rejected them for higher ranks. However, this limitation was necessitated only by the fact that the district court found the promotional procedure non-discriminatory. Id., at 1338-39, 1341. In the case at bar, however, the missing element in Bridgeport is present. Here the District Court found that access to the higher ranking Group I list was so restricted as to perpetuate the effects of discrimination against minorities; that is, at the very least, entry to the Group I level was discriminatory. While particular intervenors may not have benefitted from the defendants' practices, whites as a class, including persons formerly on the Group III list, did,* but minorities as a class did not. Therefore the minority class is entitled to affirmative relief. Since the discrimination occurred at the level being remedied by new hiring quotas, which apply to promotions that heretofore never existed, this affirmative relief is justified under Bridgeport.

* Former Group III whites who left their shop and returned to a major publisher via a small news company did benefit from such discrimination. See, e.g., Tr. 965; Px 3a-3f.

The results in Bridgeport on remand, when Judge Newman addressed the question of what to do, if anything, about the 117 positions of higher rank, further support the Agreement. These positions required three years in-grade for eligibility for the next level, and seniority was weighted 40% on promotion procedure. Despite the absence of discrimination at the promotion level, on remand Judge Newman made three modifications in promotional procedures, all of which injured current white patrolmen with legitimate expectations of advancement based upon current seniority. The existing eligibility list for the rank of sergeant was ordered terminated one year after appointment of the 15th minority patrolman. The time-in-grade criterion was reduced from 3 years to 1 year, and the weighting of seniority and other factors, including experience, was reduced from 40% to 10%. All of the white patrolmen had an interest in, and rights to, maintaining the status quo just as legitimate or more so than the interests and rights of Larkin and other intervenors. Nevertheless, since such relief was necessary, as it is here, in order not to perpetuate the effects of discrimination, nor delay, the impact of remedial action, Judge Newman's modified order was affirmed. 497 F.2d 1113 (2d Cir. 1974).

The principles established in these Second Circuit cases are in accord with the mandates of other

circuits. For example, in United States v. Ironworkers Local 86, 315 F. Supp. 1202, 1240, 1243 (W.D. Wash. 1970), aff'd , 443 F.2d 544 (9th Cir. 1971), cert. denied, 404 U.S. 984, the remedy required that minorities would skip over non-benefitted white groups already in the bargaining unit. The union there had four job referral groups (A, B, C, D), and entrance to the top three required union membership. However, there was no discrimination in entry to Group D. Even so the relief permitted minorities to enter the union without passing the exams required of white applicants, and thereby to pass over the non-union white applicants from Group D and enter the higher priority groups. Also, minorities with less than one-half the experience of whites were allowed to work from the highest priority Group A. In sum, the realistic job expectations of non-benefitted majority persons were more substantial than Larkin's, yet they were harmed by relief considered necessary to remedy Title VII violations.

In similar factual circumstances, Courts have required that minority group persons be added to hiring or referral lists with priority over more senior whites or without meeting requirements applicable to whites. See, e.g., Southern Illinois Builders Ass'n v. Ogilvie, 471 F.2d 680, 684-86 (7th Cir. 1972) (approving voluntary affirmative action plan requiring contractors to use a minimum rate of

employing 1 less experienced black trainee to 4 white journeymen); Contractors Ass'n v. Secretary of Labor, 442 F.2d 159 (3d Cir.), cert. denied, 404 U.S. (1971) (upholding the "Philadelphia Plan" requiring minority employment goals in the construction trades, irrespective of relative experience or seniority between whites and minorities); and United States v. Sheet Metal Workers Local 36, supra (qualified minorites placed on Group I referral list ahead of non-union whites without regard to construction or collective bargaining agreement experience required of whites).

Finally, the new promotion scheme adopted by the Agreement is strongly supported by promotion principles that have been applied eleswhere. In Gates v. Georgia-Pacific Corp., 492 F. 2d 292, 295-296 (9th Cir. 1974), the employer maintained a "promotion from within" policy in filling vacancies above an entry level job. Since the employer had no black accountants in entry level positions, the company's use of the system in filling higher level accounting vacancies was "inherently discriminatory." The Ninth Circuit reasoned that, although incumbents might have developed expectations for promotions, a system based on length of service alone could not be used to continue the exclusion of qualified blacks from the workforce, even though the company in the past may not have discriminated in hiring blacks.

In Allen v. City of Mobile, 466 F.2d 122 (5th Cir. 1972), aff'g per curiam 331 F. Supp. 1134, 1142-1143 (S.D. Ala. 1971) (an action under 42 U.S.C. §1983), the Court held that an employer cannot use seniority in filling promotions where blacks would be disadvantaged because the employer had discriminated in hiring blacks in the past. Similarly, the Fourth Circuit in Harper v. Kloster, 486 F. 2d 1134 (4th Cir. 1973), affirmed the trial court decision in Harper v. Mayor & City Council of Baltimore, 359 F. Supp. 1187, 1203-04 (D. Md. 1973) (an action under 42 U.S.C. §1983), which held that a fire department which historically had discriminated against blacks in hiring could not use time-in-grade or seniority as a requirement for promotion.

3. The Agreement's 25% Minority Employment Goal is Valid and Supported by the Evidence

Judge Pierce approved the 25% minority employment goal because he found "that the relevant labor force is 30% minority." Op. 24. This finding of fact is completely supported by the record in this case, and must be upheld unless Larkin meets his burden of showing it is clearly erroneous. Rule 52(a), Fed. R. Civ. Pro.

Contrary to Larkin's misleading assertions and ad hominem argument (Br. at 29), Judge Pierce reached this determination upon persuasive and credible evidence, in fact the only evidence offered on this issue, and not "upon the affidavits of the U.S. Attorney," or upon "contrived" figures. On August 15, 1974, pursuant to order of the Court at its hearing on July 15, 1972, (R. 260), the Government submitted detailed proposed findings of fact, a memorandum of law and an affidavit in support of the Agreement. (R. 116, 117 and 122). Supporting affidavits and papers were also filed by other parties. (R. 118, 119, 120, 121, 123, 129, 132). Intervenors submitted reply papers in opposition. (R. 114).

Intervenors' memorandum in opposition to the Agreement (R. 114), did not question the sufficiency of evidence to support the 25% Goal, even though it was an issue then before the District Court. Only at the final hearing on August 27, 1974, (R. 261,at 79), and in the brief on appeal, has this issue ever been raised by Larkin. In any event, Larkin's objections are frivolous.

Attached as appendices to the Government's Proposed Findings of Fact in support of the Agreement (R. 116) were true and accurate copies of specified and pertinent parts of the following government publications: U. S.

Department of Commerce, General Population Characteristics, 1970 Census of Population - Vols. Connecticut, New Jersey and New York , Appendix B and Table 33; United States Department of Commerce, General Social and Economic Characteristics, 1970 Census of Population - Vols. Connecticut, New Jersey and New York, Appendix B, Tables 81, 83, 85, 91, 92, 97, 98, 119, 120, 121, 125, 126, 130 and 131.* This Court in Rios v. Enterprise Ass'n Steamfitters, Local 638, supra., upheld the use of these very same publications as providing reliable labor force statistics when used for the purpose for which Judge Pierce relied on them. 501 F.2d at 633. They were made part of the trial record (R. 139), and were the only evidence before the District Court. Despite repeated opportunities to do so, no intervenor, including Larkin, ever offered any other evidence at the trial or in objection to the Agreement. The Government's Proposed Findings of Fact, Nos. 35 and 36, merely analyzed this evidence in light of the work distribution in the industry and drew the obvious inferences. To this day, Larkin has never offered any alternative argument or analysis, expert or otherwise. The Government submits that there is none.

* The full volumes were marked for identification at trial as Plaintiffs' Exh. 35, Vol. I - VI, and some of the portions above were received in evidence, Tr. 73, without objection from intervenors. The Devorkin affidavit (R. 122) only verified that the appendices were true and accurate copies of the specified pages of the publications.

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The Government's approach to the labor force statistical problem, which Judge Pierce adopted and concluded "is the soundest and provides ample support for the 25% minority goal," Op., at 24, followed in all respects the guidelines this Court set down in Rios. There this court noted "the objective of a remedial quota is . . . to place eligible minority members in the position which the minority would have enjoyed if it had not been the victim of discriminination." 501 F. 2d at 632. Rios holds that the district court must determine what percentage of the industry in question would have been minority as of the date of the decree, on the basis of the minority percentage of the labor force in the Union's jurisdiction, and from which the industry draws employees. Id., at 632-33. In the instant case, it was reasonable for Judge Pierce to conclude that persons with some college education would be unlikely to have applied for these jobs, and that therefore, the most relevant and clearly available pool of labor for the delivery jobs in this industry could be found from the figures available showing the male civilian labor force 16 years old and over, with a high school education or less, in the area of the Union's

jurisdiction.*

The statistics set forth in detail in Proposed Finding of Fact No. 36 (R. 116) establish that minority persons comprise 32.88; 41.13; 9.23; 12.71; and 17.37 per centum of the high school educated labor pool in the following respective geographic areas: New York City and Nassau County; Mt. Vernon, New York; Suffolk County; Stamford, Conn.; and Bergan, Essex, Hudson, Middlesex, Monmouth, Passaic and Union Counties, New Jersey. These labor force statistics were then weighted on the basis of the geographic distribution of jobs in the industry as set forth in Proposed Finding of Fact No. 35. (R. 116). When this was done, it was clear that minorities would have comprised more than 30% of the jobs in this industry if generally prevailing, non-discriminatory employment practices in the area had pertained to this industry. Therefore, the District Court's approval of the 25% goal is fully justified and completely reasonable.

*While this may not be a perfect description, Rios recognizes that the statistics found in the United States Department of Commerce publications, cited above and before the District Court as evidence, would be a reliable, accurate and acceptable basis for arriving at an appropriate minority percentage goal. Id., at 633.

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CONCLUSION

For the reasons set forth above, the Final Order and Judgment of the District Court should be affirmed in all respects.

Respectfully submitted,

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December 12, 1974

Form 280 A-Affidavit of Service by Mail
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AFFIDAVIT OF MAILING

CA 74-2548

State of New York)
County of New York) ss

Pauline Troia, being duly sworn, deposes and says that she is employed in the Office of the United States Attorney for the Southern District of New York.

That on the 12th day of December 19 74 she served a copy of the within

govt's brief

by placing the same in a properly postpaid franked envelope addressed:

on (18) eighteen parties see attached list.

And deponent further says she sealed the said envelopes and placed the same in the mail chute drop for mailing in the United States Courthouse, Foley Square, Borough of Manhattan, City of New York.

Pauline Troia

Sworn to before me this

12th day of December 19 74

Walter G. Brannon

WALTER G. BRANNON
Notary Public, State of New York
No. 24-0394500
Qualified in Kings County
Cert. filed in New York County
Term Expires March 30, 1975

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